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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RICKEY BURNETT HAWKINS,

Defendant and Appellant.

B205507

(Los Angeles County
Super. Ct. No. KA078353)

APPEAL from a judgment of the Superior Court of Los Angeles,
Bruce Marrs, Judge. Affirmed in part and remanded with directions.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria
Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Rickey Burnett Hawkins appeals from the judgment entered following his conviction by a jury on one count of first degree burglary and one count of assault with a deadly weapon with special findings by the jury concerning several weapons-use and great bodily injury enhancement allegations and by the court in a bifurcated proceeding regarding prior felony conviction allegations. Hawkins contends the trial court erred in failing to instruct the jury sua sponte concerning his right to enter the residence at issue in the burglary charge and the evidence is insufficient to support one of the court's prior strike findings. We modify Hawkins's sentence to correct the court's erroneous imposition of concurrent terms for several enhancements and otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Crimes Committed by Hawkins

In 2004 Sabrina Randle rented a house in Pomona where she lived with Hawkins, her father and her two children. The rental agreement was in Randle's name, but the bill for the telephone service at the residence was in Hawkins's name. Hawkins received his mail at the house, including government-issued checks for Randle's care.

Hawkins and Randle had a contentious relationship. When Hawkins physically abused her, Randle would demand he leave the house. They would then reconcile, and she would allow him to move back in with her.

On March 4, 2007 Nathan Miller, a former boyfriend, went to see Randle. Hawkins met Miller at the door, identified himself as Randle's boyfriend and told Miller never to come back. The following day Randle "put [Hawkins] out" of the house. Hawkins left, taking his personal belongings with him.

The next day Miller returned to the house to see Randle. She invited Miller to stay, saying she and Hawkins were no longer in a relationship: She had "kicked [him] out yesterday." During the evening Hawkins repeatedly telephoned Randle, asking if Miller was still there. Randle told him "not to worry about who was in [her] house." Miller spent the night with Randle.

Early on the morning of March 7, 2007 Hawkins arrived at the house and began yelling at Randle and banging on her bedroom window. He threw some rocks, shattering the bedroom and kitchen windows. Randle's father stepped outside to speak to Hawkins, who rushed past him, kicked open the front door and entered the house. Armed with a knife, Hawkins confronted Miller in the entryway; and the two men exchanged blows. Hawkins stabbed Miller, who collapsed on the floor. Miller was later airlifted to a hospital and treated for multiple stab wounds.

2. The Information

Hawkins was charged by amended information with attempted murder (Pen. Code, §§ 187, 664)¹ (count 1), first degree burglary (§§ 459, 460, subd. (a)) (count 2) and assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3). The information specially alleged as to all counts Hawkins had inflicted great bodily injury on Miller within the meaning of section 12022.7, subdivision (a), and, as to counts 1 and 2, Hawkins had used a deadly weapon (knife) within the meaning of section 12022, subdivision (b)(1). The information also alleged Hawkins had suffered two prior serious felony convictions within the meaning of section 667, subdivision (a)(1), and three serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It further alleged he had previously served two separate prison terms for felony convictions (§ 667.5, subd. (b)). Hawkins pleaded not guilty and denied the special allegations.

¹ Statutory references are to the Penal Code.

3. The Trial, Verdict and Sentence

Testimony presented by the People described Hawkins's relationship with Randle, Randle's demand that Hawkins leave on March 5, 2007 and the events of the following two days, including Hawkins's uninvited entry into the home and assault on Miller with a knife. The defense theory was that at least a reasonable doubt existed as to whether Miller or Hawkins was the aggressor. Hawkins did not testify or present evidence in his defense other than by way of cross-examination of the People's witnesses.

The court instructed the jury on the elements of burglary using CALJIC No. 14.50: "Every person who enters any building with the specific intent to commit attempted murder . . . or assault with force likely to produce great bodily injury or a deadly weapon . . . is guilty of the crime of burglary in violation of Penal Code section 459. A building is a structure. It does not matter whether the intent with which the entry was made was thereafter carried out. In order to prove this crime, each of the following elements must be proved: 1. A person entered a building; and 2. At the time of the entry, that person had the specific intent to commit the crime of attempted murder . . . or assault with a deadly weapon or force likely to produce great bodily injury." The court also instructed on the difference between first and second degree burglary (CALJIC No. 14.151) and the definition of an inhabited dwelling house (CALJIC No. 14.52). Hawkins did not object to these instructions or request any pinpoint instructions.²

The jury found Hawkins not guilty of attempted murder but convicted him of first degree burglary and aggravated assault and found true the related special allegations involving use of a weapon and infliction of great bodily harm. Hawkins waived his right to a jury trial on the prior conviction allegations and was found after a court trial to have suffered two prior serious felony convictions under section 667, subdivision (a), and the Three Strikes law and to have served one separate prison term for a felony.

² At the People's request the jury was instructed on self-defense although Hawkins did not rely on a theory of self-defense as an affirmative defense.

The trial court denied Hawkins’s motion to dismiss one of his prior strike convictions. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; § 1385, subd. (a).) Hawkins was sentenced to an aggregate state prison term of 35 years to life: 25 years to life as third-strike offender for first degree burglary plus five years for each of his two prior serious felony convictions. The court also imposed concurrent terms of one year for the weapon-use enhancement, three years for the great bodily injury enhancement and one year for the prior prison term enhancement. Hawkins’s sentence for assault with a deadly weapon was stayed pursuant to section 654.

DISCUSSION

1. The Trial Court Had No Sua Sponte Duty To Instruct on the Issue of Possessory Interest

In criminal cases “a trial court has a duty to instruct the jury ‘sua sponte on general principles which are closely and openly connected with the facts before the court.’” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.) We review de novo the claim a court failed to properly instruct the jury on the applicable principles of law. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

Citing *People v. Gauze* (1975) 15 Cal.3d 709 (*Gauze*), which held a defendant could not be guilty of burglarizing his or her own home as long as he or she has an unconditional possessory right of entry, Hawkins contends the trial court had a sua sponte obligation to instruct the jury it must find Hawkins did not have an unconditional possessory right to enter Randle’s house to convict him of burglary. (See *People v. Pendleton* (1979) 25 Cal.3d 371, 382 [“law after *Gauze* is that one may be convicted of burglary even if he enters with consent, provided he does not have an unconditional possessory right to enter”].) Hawkins contends the jury could have found he had an unconditional right to enter the house on March 7, 2007 because he had been residing there for years, receiving mail and using telephone service in his name. Hawkins maintains his on-again, off-again relationship with Randle—the couple would break up and separate briefly, but would then reconcile and resume living together—supported the

reasonable inference their most recent separation may not have been understood by either Hawkins or Randle as altering Hawkins's possessory rights.

The Supreme Court in *Gauze*, *supra*, 15 Cal.3d 709 and subsequent case law draw a clear distinction between a defendant who has an unconditional possessory right of entry—that is, an absolute right that could not be conditioned on the consent of another owner/occupant such as a roommate (*id.* at p. 714)—and mere consent to entry by the owner/occupant. (See, e.g., *People v. Sears* (1965) 62 Cal.2d 737, 746, overruled on other grounds by *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17 [analysis reaffirmed in *Gauze*; burglary conviction proper when husband has moved out of family home three weeks before and had no right to enter without permission].) Thus, a person who enters a residence for a felonious purpose may be found guilty of burglary even if he or she enters with the owner's express or implied consent. (See *People v. Frye* (1998) 18 Cal.4th 894, 954 disapproved of on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 [no evidence of unconditional possessory right to enter]; *People v. Pendleton*, *supra*, 25 Cal.3d at p. 382 [burglary occurs even if defendant entered with consent if defendant does not have “unconditional possessory right to enter”]; *People v. Smith* (2006) 142 Cal.App.4th 923, 929-932 [husband subject to court order not to enter family home after he assaulted his wife could be convicted of burglary of home]; *People v. Davenport* (1990) 219 Cal.App.3d 885, 892 [husband who had moved out of family cabin, relinquished key, and removed some of his property could be convicted of burglary of cabin]; see also *In re Richard M.* (1988) 205 Cal.App.3d 7, 15-16 [family member who has moved out of family home commits burglary if he or she makes an unauthorized entry with a felonious intent since he or she has no claim of a right to enter that residence].)

Here, the undisputed evidence established at the time Hawkins entered Randle's house and attacked Miller he had no unconditional right to enter the premises. Two days before the incident Randle demanded Hawkins leave her house, which he did, taking his belongings with him. During the intervening days, Randle repeatedly told Hawkins he was no longer welcome at her house and who might be staying there was none of his

concern. Hawkins apparently did not have a house key: After returning that morning to harass Randle and Miller, he was only able enter the house by slipping past Randle's father and kicking open the front door. Thus, when he gained entry and attacked Miller, Hawkins's status was that of a trespasser, not a lawful resident.

Contrary to Hawkins's claim, the history of his relationship with Randle does not support a sua sponte instruction on the concept of unconditional possessory right of entry. When there were disputes between Hawkins and Randle, he moved out when she demanded he leave and returned only when she allowed him to do so. This pattern, repeated over time, confirms whatever right of entry Hawkins may have had with respect to Randle's house, it was never unconditional.

In sum, the evidence supporting Hawkins's claim of an unconditional possessory right to Randle's house is not substantial enough to merit consideration by the jury. The trial court had no sua sponte duty to instruct on the issue. (See *People v. Roldan* (2005) 35 Cal.4th 646, 716-717 disapproved of on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

2. *Substantial Evidence Supports the Trial Court's Determination Hawkin's 2000 Aggravated Assault Conviction Is a Qualifying Strike Conviction*

Assault with a deadly weapon is a serious felony under the Three Strikes law. (§ 1192.7, subd. (c)(31).) On the other hand, although "serious felonies include all those 'in which the defendant personally inflicts great bodily injury on any person' (§ 1192.7), subd. (c)(8)), assault merely by means likely to produce GBI [great bodily injury], without the additional element of personal infliction, is not included in the list of serious felonies" under the Three Strikes law. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (italics omitted); see also § 1192.7, subd. (c).) Thus, a conviction for assault with a deadly weapon under section 245, subdivision (a)(1), is a serious felony, but a conviction under the same section for assault by means likely to produce great bodily injury is not. (*Delgado*, at p. 1065.)

At the bifurcated bench trial the court found, based on the abstracts of judgment and related materials introduced into evidence, Hawkins had suffered two prior strike

convictions, a 2000 conviction for assault with a deadly weapon and a 2005 conviction for assault with a deadly weapon. The abstract of judgment for the 2000 conviction in Riverside County stated Hawkins had pleaded guilty to violating section 245, subdivision (a)(1) “Assault/Force Li.”³

Hawkins asserts the abstract of judgment suggests his 2000 conviction was for assault by means likely to produce great bodily injury, rather than a qualifying strike conviction for assault with a deadly weapon. According to Hawkins, the “Assault/Force Li” reference in the abstract of judgment is the only indication as to which of the two section 245, subdivision (a)(1) violations was the subject of his plea. The felony complaint, felony plea form and minute order from the plea proceeding are all ambiguous, referring either to both violations or merely to “P.C. 245(a)(1)” and “count 1.” (See, e.g., *People v. Banuelos* (2005) 130 Cal.App.4th 601, 606-607 [abstract of judgment’s notation of “ASSAULT GBI W/ DEADLY WEAPON” mentioned both prongs of § 245, subd. (a)(1), and was, therefore, ambiguous; by mentioning both prongs the notation may simply have been “a shorthand description of criminal conduct covered by section 245, subd. (a)(1) itself”]; see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 [abstract of judgment showing guilty plea to § 245, subd. (a)(1), and describing offense as “ASLT GBI/DLY WPN” insufficient to show prior conviction under § 245, subd. (a)(1), was for assault with deadly weapon].)

We are not persuaded the record before the trial court is ambiguous, as Hawkins asserts. Although the documentary evidence may not have been as clear as it could have been, the felony complaint for the 2000 offense, while referring to both prongs of section 245, subdivision (a)(1), specifically describes the assault as having been committed “with a deadly weapon other than a firearm, to wit: PIPE” (Cf. *People v. Johnson* (1990) 217 Cal.App.3d 978, 985 [guilty plea constituted admission of all factual allegations in

³ In contrast, the abstract of judgment for the 2005 conviction referred to a violation of section 245, subdivision (a)(1), “Assault with Dea.” The plea form for the 2005 offense expressly states Hawkins was pleading to “assault with a deadly weapon—vehicle,” as well as to a misdemeanor charge of hit-and-run driving.

the information].) At no time did Hawkins argue this evidence was insufficient to establish the 2000 conviction for aggravated assault qualified as a strike conviction. Indeed, in his *Romero* motion seeking to dismiss one of his strike pleas, Hawkins described the 2000 conviction as one of “two prior strikes for assault with a deadly weapon.” While there can be no forfeiture of a sufficiency of the evidence claim, Hawkins has effectively admitted his 2000 conviction in Riverside County was for assault with a deadly weapon under section 245, subdivision (a)(1). Under these circumstances we do not believe it is necessary or appropriate to remand the matter to the trial court for retrial of the prior conviction allegation. (See *People v. Barragan* (2004) 32 Cal.4th 236, 239 [retrial of a strike allegation is permissible when trier of fact finds the allegation to be true but an appellate court reverse that finding for insufficient evidence].)

3. Imposition of Concurrent Terms for the Sentencing Enhancements Was Unauthorized

“It is well established that the prosecution may raise for the first time on appeal . . . the question of whether a sentence was unauthorized by law. [Citations.] The [California] Supreme Court has held that when a trial court pronounces an unauthorized sentence that such a judgment is subject to being set aside judicially and is no bar to the imposition of a proper judgment thereafter, even though it is more severe than the original unauthorized pronouncement.’ [Citations.] [¶] Even where the prosecution has not appealed, appellate courts have ordered correction of sentences under varying circumstances.” (*People v. Irvin* (1991) 230 Cal.App.3d 180, 190.)

The People argue and Hawkins essentially concedes the trial court erred by imposing concurrent terms for the three-year great bodily injury enhancement (§ 12022.7, subd. (a)), the one-year weapon-use enhancement (§ 12022, subd. (b)(1)) and the one-year prior prison term enhancement (§ 667.5, subd. (b)) on the residential burglary count. These enhancements by their terms must be imposed to run consecutively to the principal term. (§ 12022.7, subd. (a) [requires “an additional and consecutive term of imprisonment in state prison for three years” be imposed]; § 12022, subd. (b)(1) [requires an “additional and consecutive term of imprisonment” of one year]; § 667.5, subd. (b)

[requires one-year enhancement “in addition and consecutive to any other prison terms therefor”].)

By providing for these enhancements to run concurrently, rather consecutively, the trial court may have intended to exercise its sentencing discretion to effect a measure of leniency. The record does not assist us in this respect. Accordingly, we must remand the matter to the trial court for resentencing with directions to impose a consecutive term for each enhancement not stricken pursuant section 1385. (See *People v. Campbell* (1999) 76 Cal.App.4th 305, 311.) We express no opinion on whether the trial court should, acting within its discretion, strike one or more of the enhancements on resentencing. If striking an enhancement, however, the record must show the trial court found mitigating circumstances justifying its action. (*People v. Savedra* (1993) 15 Cal.App.4th 738, 747.)

DISPOSITION

The case is remanded for resentencing as to the enhancements imposed on count two, first degree burglary, pursuant to section 12022.7, subdivision (a), section 12022, subdivision (b)(1), and section 667.5, subdivision (b). In all other respects the judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.